LAW AND THE DOCTOR

VOL. I

PHYSICIAN'S CIVIL LIABILITY FOR MALPRACTICE.

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THE LAW AND THE DOCTOR.

A COMPILATION OF THE FUNDAMENTAL LEGAL PRINCIPLES GOVERNING THE RELATION OF THE PHYSICIAN TO HIS PATIENTS AND THE COMMUNITY AT LARGE

VOLUME I.

THE PHYSICIAN'S CIVIL LIABILITY FOR MALPRACTICE.

PREPARED EXPRESSLY FOR PHYSICIANS BY

THE ARLINGTON CHEMICAL COMPANY

YONKERS, N. Y.

FIRST WORD.

AMID the multiplicity of his daily duties, the physician has but scant time to cultivate more than a passing acquaintance with the collateral branches of his profession; the average doctor, therefore, knows but little of the legal aspect of his relations to the body politic, of his rights and privileges, or his liabilities and responsibilities to his patients and the community at large. While it is not our intention to urge the physician to become his own lawyer, we believe that he should acquaint himself with the fundamental principles of medical jurisprudence, so that he may be reasonably well prepared to defend his own or his brother physician's rights and privileges in a court of justice.

With a view of placing such information at the immediate and convenient disposal of the doctor, the makers of *Liquid Peptonoids* have arranged to issue, under the title "THE LAW AND THE DOCTOR," two 50-page booklets, which shall present in condensed form and succinct style an epitome of the essentially important features of (1) "THE PHYSICIAN'S CIVIL LIABILITY FOR MALPRACTICE," and (2) "THE PHYSICIAN AS A WITNESS." These monographs have been expressly prepared by an eminent member of the New York Bar, who is well recognized by the legal profession as an expert in this special branch of practice. The first of these reference text manuals we herewith present to our friends in the profession. The second monograph will follow after a reasonable interval. We hope, sincerely, that these brochures may be of actual service to more than one physician whose professional career may perhaps be placed in jeopardy because of an unjust suit for damages.

Sincerely yours,

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THE LAW AND THE DOCTOR.

VOL. I.

Physician Not Required to Attend When Called.

A popular impression prevails that the physician, by reason of the privileges conferred upon him by the State, is, in the absence of an adequate reason for not so doing, required to respond to all calls to render professional services. This is clearly erroneous, except where the physician has already undertaken the treatment of the case, or except where he is an officer of the government charged with specific duties which he thereby violates. (*a*)

A case of arbitrary refusal to attend a patient was recently argued before the Supreme Court of Indiana. In this case a sick man sent a messenger to a general practitioner who had been his family physician. The messenger informed the physician that the man was violently ill, tendered him the fees for the desired services, and stated that no other physician was procurable in time, and that he was relied upon to render the necessary services. The physician, without any reason whatever (so the reported case shows), refused to render the services, and the man died before any other physician could be procured. The court, in referring to the contention of counsel that the act regulating the practice of medicine required the physician to undertake the treatment of patients under such circumstances, explained the purpose and effect of the act as follows:—

"The act regulating the practice of medicine provides for a board of examiners, standards of qualification, examinations, licenses to those found qualified, and penalties for practicing without license. The act is a preventative, not a compulsory, measure. In obtaining the State license to practice medicine, the State does not require, and the license does not engage, that he will practice at all or on other terms than he may choose to accept." (*b*)

(*a*) Wharton on Negligence, Sec. 731. (*b*) Hurley Adm. *v.* Eddingfield, 156 Ind. 416.

The physician having undertaken the treatment of a patient, the law, by implication, immediately creates for him a contract, the breach of which constitutes malpractice. The nature of this contract, the acts and things which affect it, and the civil liability that grows out of its breach, will be examined in detail in the following pages.

Contract of Physician Implied on Undertaking Case.

The contract of the physician, as created by implication of law, upon his undertaking the treatment of a case is:—

First. That he possesses a reasonable degree of skill and learning.

Second. That he will use reasonable and ordinary care and diligence in the treatment of the case committed to him.

Third. That in all cases where there is room for doubt he will use his best judgment.

Reasonable Degree of Skill and Learning Defined.

The question of what "a reasonable degree of skill and learning" means has been very well settled by a line of decisions. It has been held that a physician is not required to have the "highest" degree of skill or to be "thoroughly" educated, but that "proper," "reasonable," "ordinary" knowledge and skill are required.

Mr. Justice Craig, in the case of Barnes *v.* Means, (*a*) said:—

"The law required appellants, who hold themselves out to the public as physicians and surgeons, to possess, and in their practice use, ordinary skill in their profession. While perhaps they would not be required to possess the high degree of skill which the most learned might acquire in the profession, yet they were bound to have, and in their practice use, that degree of skill which is ordinarily possessed by physicians in practice."

In the case of Quinn *v.* Donovan (*b*) an instruction by the trial court to the effect that if the physician could have learned the nature of the malady and applied a proper remedy, and yet failed to do so, then he was liable, was held to state too high a requirement. The court, in reviewing the case upon appeal, said:—

"Appellant may have used reasonable skill and failed, when, under the rule announced in the instruction, if by the exercise of a higher degree of

(*a*) Barnes *v.* Means, 82 Ill. 379. (*b*) Quinn *v.* Donovan, 85 Ill. 194.

skill he could have applied the proper remedy but failed to do so, he is liable. . . . The law implies no such duty upon appellant, and we are of opinion the instruction was calculated to mislead the jury, and it should have been modified."

In determining in a given case whether the physician was possessed of reasonable and ordinary skill and learning, due regard must be had to the advanced state of medical science at the time. (*a*) The application of this rule is well shown in the case of Peck *v.* Hutchinson, (*b*) in which the plaintiff alleged that defendant negligently performed an operation upon her ward's eye without the use of general anæsthetics; the plaintiff, against the objection of defendant, read to the jury from "Well's Treatise on the Eye," edition of 1880, that an operation of the character performed by the defendant should never be performed without the use of general anæsthetics. The defendant, who performed the operation in 1886, showed that he used cocaine, which, as a local anæsthetic, had been discovered since the publication of the work above mentioned, and was generally considered preferable to general anæsthetics in case of such operations. Evidence having been introduced to show the advances in the use of local anæsthetics in case of such operations, the court held that the defendant was not prejudiced by the reading from the text-book, as it was manifest to the jury that the work did not represent the advanced state of medical science.

The degree of knowledge and skill required of the physician also depends upon the opportunities of his locality; for example, it would be manifestly unfair to expect and require of a physician practicing in a small country town, with no opportunity for experience in surgical cases save that usually had by country physicians, to have the same amount of knowledge and skill in matters of surgery as those physicians practicing in the great cities, whose practice is more extended in its scope, and who have the opportunity of attending lectures and clinics, and of witnessing and taking part in operations requiring a high degree of skill and learning. The case of Small *v.* Howard (*c*) is illustrative of the

(*a*) Almond *v.* Nugent, 34 Ia. 300; Haire *v.* Reese, 7 Phila. (Pa.) 138.
(*b*) Peck *v.* Hutchinson, 88 Iowa 320, 55 N. W. Rep. 511.
(*c*) Small *v.* Howard, 128 Mass. 131.

idea. The inside of the plaintiff's wrist had been cut through to the bone, severing all the arteries and tendons; defendant, who had attended the case, was a physician practicing in a small town of about twenty-five hundred inhabitants, and had no experience in surgery beyond that usually had by country surgeons. Among the instructions which the trial judge gave to the jury was the following:—

"The defendant, undertaking to practice as a physician and surgeon in a town of comparatively small population, was bound to possess that skill only which physicians and surgeons of ordinary ability and skill, practicing in similar localities, with opportunities for no larger experience, ordinarily posses; and he was not bound to possess that high degree of art and skill possessed by eminent surgeons practicing in large cities and making a specialty of the practice of surgery."

The Supreme Court, in reviewing the case, approved of this instruction as expressive of the true doctrine of law.

The rule, in its most generally accepted form, is that the skill and learning required of physicians is that "which physicians and surgeons practicing in similar localities ordinarily possess." (*a*) Not the skill and learning of physicians and surgeons practicing in the particular locality, for, as said by Mr. Justice Worden, in the case of Gramm *v.* Boener:— (*b*)

"There might be but a few practicing in the given locality, all of whom might be quacks, ignorant pretenders to the knowledge not possessed by them, and it would not do to say that, because one possessed and exercised as much skill as the others, he could not be chargeable with the want of reasonable skill."

Degree of Skill and Learning Required of a Specialist.

A specialist is legally defined as a physician or surgeon who applies himself to the study and practice of some particular branch of the profession. Being a man who is employed because of his peculiar knowledge and skill in that branch, it follows that his duty to his patients in the practice of his specialty is not measured by the ordinary or average skill of general practitioners, for, as Mr. Justice Roby aptly says:—

"If he possesses no greater skill in the line of his specialty than the average physician, then there should be no reason for his employment; possessing such additional skill, it becomes his duty to give his patients the benefit of it." (*c*)

(*a*) Dunbauld *v.* Thompson, 109 Ia. 199; Whitsell *v.* Hill, 101 Ia. 629.
(*b*) Gramm *v.* Boener, 56 Ind. 497.
(*c*) Baker *v.* Hancock, Ind. App.; 63 N. E. Rep. 323.

In short, the standard of skill and learning required by the law of one who holds himself out as a specialist is that degree of skill and knowledge which is ordinarily possessed by physicians who devote special attention and study to the particular disease or class of diseases, and to its diagnosis and treatment, having regard to the present state of scientific knowledge. Accordingly, it is held that an oculist who treats a patient must exercise, in such treatment, the care and skill usually exercised by oculists in good standing. (*a*) Whether the physician does hold himself out as a specialist is a question of fact to be shown by the patient on the trial. (*b*)

Refusal of Proffered Assistance of Other Physicians Does Not Affect Skill Required.

The fact that the physician refuses the proffered assistance of other medical men does not in any way affect the degree of skill he is required to exercise, but simply amounts to an implied declaration of his ability to treat the case properly. (*c*)

Care and Diligence Required.

The physician being possessed of the requisite amount of skill and learning to qualify him as a medical practitioner, it remains to consider next the amount of care and diligence with which he must exert his skill and apply his learning. It is manifest that a physician may be possessed of great skill and learning and yet, through indifference or by reason of a too hasty examination, mistake or overlook well-recognized symptoms of the patient's real malady; and, arriving at an erroneous conclusion regarding his actual condition, apply treatment well calculated to alleviate the supposed condition, but which may aggravate the existing malady.

The degree of care and diligence with which the physician is required to apply his science is again defined as "reasonable" and "ordinary." (*d*) The rule, as laid down by the court of last resort in New York some years ago, is that the physician "will use reasonable and ordinary care and diligence in the exercise of his skill and the application of his knowledge to accomplish the pur-

(*a*) Stern *v.* Lanng, 106 La. 738.
(*b*) McMurdock *v.* Kimberlin, 23 Mo. App. 523.
(*c*) Potter *v.* Warner, 91 Pa. St. 362.
(*d*) Leighton *v.* Sargent, 27 N. H. 460.

pose for which he is employed." (*a*) This definition of the degree of care and diligence required seems to have been generally accepted by the courts. (*b*)

The question of what is "reasonable and ordinary" care and diligence, when applied to a particular case, is peculiarly one of fact, and depends largely upon the condition of the patient. Thus, it is manifest that a degree of care and diligence which would be adequate in the treatment of a young and vigorous patient, suffering from a slight illness, would not be reasonable care and diligence in case of an old and feeble patient threatened with, or suffering from, a serious ailment. In short, the test is that reasonable and ordinary care and diligence is such as a competent and reasonably careful physician would give to that particular case.

It must not be inferred, however, that the physician is required to use care and skill proportionate to the character of the injury or disease he is treating. In cases of extreme illness, such a rule would necessitate qualifications, at times, beyond the possibility of human attainment. Such a rule has properly been rejected by the courts. (*c*)

Duty to Instruct Patient and Nurse.

The physician, having applied his skill and learning with proper care and diligence in the treatment of a patient, may still be guilty of negligence in omitting to instruct the patient or his nurse as to the manner in which he should care for the injury, either during or subsequent to such treatment. (*d*) The necessity that a physician should give proper instructions to his patients is well expressed in the case of Carpenter *v.* Blake, (*e*) where Mr. Justice Mullin says:—

"If in case of dislocation of the elbow joint, it is enough for the physician to replace the bones and put the arm on a pillow, with the part below the joint at right angle with that above it, and directing the application of cold water, it would seem to be proper, if not necessary, that the attending surgeon should inform the patient, or those having charge of him or her, of the necessity of maintaining that position; and if there is a tendency in the limb to become straight, or if, in consequence of the severity of the injury to the ligaments

(*a*) Carpenter *v.* Blake, 10 Hun, 358.
(*b*) Kuhn *v.* Brownfield, 34 W. Va. 252; Cayford *v.* Wilbur, 86 Me. 414; McNevins *v.* Lowe, 40 Ill. 210; Fisher et al *v.* Niccolls, 2 Ill. App. 484; Patten *v.* Wiggin, 51 Me. 594; McCandless *v.* McWha, 22 Pa. St. 261; Craig *v.* Chambers, 17 Ohio St. 253.
(*c*) Utley *v.* Burns, 70 Ill. 162.
(*d*) Beck *v.* German Klinik, 78 Ia. 696; Pike *v.* Honsinger, 155 N. Y. 201.
(*e*) Carpenter *v.* Blake, 60 Barb. 488.

above the joint, there is great pain, which renders the patient nervous and restless, thus increasing the tendency to relaxation, or to straighten, and, as a consequence, to stiffen the joint, the danger should be disclosed, to the end that all proper precaution may be taken to prevent it. It is insisted that these dangers were imminent, and yet no word was given. This was, in my judgment, culpable negligence; much of the suffering the patient has undergone, and much of the loss she has sustained, might have been prevented had the defendant done what it was clearly his duty to do, if he knew the consequences which might result from redislocating the joint or straightening the arm."

While it is incumbent upon the physician to give proper instruction for the nursing and care of his patients, yet he is under no obligation to nurse and care for them. (*a*)

Duty to Continue Attendance.

The physician is required to exercise proper care and judgment, also, as to when he may safely discontinue his visits, there being no specific contract governing the period during which services shall continue, for it certainly would be a dereliction of duty to leave the patient in the midst of a critical illness without cause, or without sufficient notice to enable him to procure other suitable medical attendance. (*b*) It would seem that a physician, having undertaken a case, cannot cease his visits except, first, with the consent of the patient; or, secondly, upon giving the patient timely notice, so that he may employ another doctor; or, thirdly, when the condition of the patient is such as to require medical treatment no longer. Of that condition the physician must judge at his peril. (*c*) Thus, a physician may become liable to an action for malpractice because of unreasonable delay in calling upon a patient; as where a physician properly set a broken arm and at the time told the patient that he was going away on his vacation and would return in two weeks, and directed the patient to keep the arm in a sling. The physician remained away five weeks, during which time the bones had slipped and so united as to cause permanent injury, and the physician was held liable for damages.

As a corollary to the foregoing rule, it follows that the physician is the proper and the sole judge of the necessary frequency of his visits to a patient so long as the latter is in his charge, and that

(*a*) Graham *v.* Gautier, 21 Tex. 111.
(*b*) Barbour *v.* Martin, 62 Me. 536.
(*c*) Becker *v.* Janinski, 27 Abb. N. C. 45.

upon bringing an action for such visits he is not required to prove them to have been necessary. (*a*)

Required Care Relates Only to Services for Which Physician is Employed.

The requirement that the physician shall exercise reasonable and ordinary care applies only to the exercise of the professional duties for which he is employed. Where a physician was called to attend a patient with typhoid fever and rendered skillful and careful services with the result that the patient recovered from that malady, but failed to comply with the patient's request to send her an oculist, as he had promised to do, by reason of which she lost the use of her eyes, there being no proof that the diseased condition of the eyes was due to the condition which defendant had been called to treat, the court held that the physician was employed to treat the patient for fever, and that this employment imposed no duty upon him to provide her with a specialist for the eye. (*b*)

Degree of Care Required Not Affected by Services Being Paid For by Third Party or by Gratuitous Services.

In the case of DuBois *v.* Decker (*c*) the patient was treated at the city almshouse by a city physician. The defendant moved to dismiss the complaint upon the ground that it failed to show a contractual relation between the parties whereby it became the physician's duty to treat the patient carefully and skillfully, but the motion was dismissed. The Court of Appeals, in sustaining this ruling, said :—

"The fact that he was paid by the city instead of the plaintiff did not relieve him from the duty to exercise ordinary care and skill."

Likewise, the fact that the services are gratuitous in no respect qualifies or diminishes the requisite degree of care due the patient. (*d*) The reason, as well as necessity, for such a rule is admirably expressed by Mr. Justice Pryor in a charge to the jury, in which he says :—

"It appears that the plaintiff was a charity patient; that defendant was treating her gratuitously. But I charge you that this fact in no respect quali-

(*a*) Ebner Admx. *v.* Mackey, 186 Ill. 297.
(*b*) Jones *v.* Vroom, 8 Colo. App. 143.
(*c*) DuBois *v.* Decker, 130 N. Y. 325.
(*d*) McNevins *v.* Lowe, 40 Ill. 209.

fies the liability of the defendant. Whether the patient be a pauper or a millionaire, whether he be treated gratuitously or for reward, the physician owes him precisely the same duty and the same degree of skill and care. He may decline to respond to the call of a patient unable to compensate him; but if he undertakes the treatment of such a patient, he cannot defeat a suit for malpractice, nor mitigate a recovery against him, upon the principle that the skill and care required of a physician are proportionate to his expectation of pecuniary recompense. Such a rule would be of the most mischievous consequence; would make the health and life of the indigent the sport of reckless experiment and cruel indifference. Even though, therefore, the defendant was not to be paid for his attendance, he was still bound in law to treat the plaintiff with the requisite skill and requisite care." (*a*)

Physicians Must Follow Established Modes of Practice.

The rule is very strict that a physician must follow established modes of practice, and that if he departs from recognized remedies or methods of treatment, he does so at his peril. In a recent case, (*b*) the trial judge instructed the jury that:—

"A departure from approved methods in general use, if it injures the patient, will render him (the physician) liable, however good his intentions may have been."

This instruction was criticised because its effect was to make the physician liable in case of injury to the patient whenever he should adopt new methods, even though they were good methods, and that such a rule would retard progress. The Supreme Court, in reviewing the case, declared that the instruction was supported by the weight of authority

"in cases where there can be said to be a thoroughly established and usual method of treating a situation, meaning thereby that where a certain mode of treatment has been recognized, adopted, and followed by all physicians and surgeons of good standing, a departure therefrom would be clearly at the risk of the physician venturing to make the same."

In a case which arose in Colorado (*c*) the patient was afflicted with phimosis, and the expert evidence clearly showed that the ordinary and established practice of the profession in the treatment of such cases was to slit up the foreskin so as to free the glans and allow circulation. It was proven that by reason of the application of a flaxseed poultice, a remedy not recognized for such condition, the malady was aggravated, resulting in gangrene and the consequent

(*a*) Becker *v.* Janinski, 27 Abb. N. C. 45.
(*b*) Allen *v.* Voje, 114 Wis. 1; 89 N. W. Rep. 924.
(*c*) Jackson *v.* Burnham, 20 Colo. 532.

destruction of the member. The court held it to be immaterial that the physician was an admittedly skillful and reputable practitioner if in the case at bar he varied from the well-established mode of treatment, thereby following the doctrine laid down by the Supreme Court of Maine (*a*) that:—

> "If the case is such that no physician of ordinary knowledge or skill would doubt or hesitate, and but one course of treatment would by such professional men be suggested, then any other course of treatment might be evidence of a want of ordinary knowledge or skill, or care and attention, or exercise of his best judgment, and a physician might be held liable, however high his former reputation."

In many medical cases it is, no doubt, very difficult to say absolutely that a certain mode of treatment does or does not conform to the recognized practice. New methods will necessarily be devised and applied as medical science advances. The law has no purpose to retard such progress by unduly extending the rule above discussed. On the contrary, every presumption exists in favor of the physician's due and proper treatment, and only in cases where the departure from the established mode is an unduly radical one will the physician be held accountable. Whenever a doubt exists, the same will be resolved in favor of the practitioner. In a case which arose in Chicago a few years ago (*b*) the patient suffered from sciatic rheumatism, and on the advice of her physician an operation was performed. An incision was made in the left leg at a point where the large sciatic nerve is readily located. The nerve was pulled out of its sheath and vigorously stretched. It was then restored to its place and the incision closed. The knee, ankle, and hip joints were then manipulated, in order to break up an ankylosis which existed in the joints, and to give them as much of the natural motion as possible. In order to prevent the ligaments from again contracting, the limb was kept stretched for several weeks. The patient claimed that, in spite of this treatment, she never fully recovered from the disease, and, moreover, that the leg affected became contracted and shorter than the other. It was insisted that the proper and established treatment would have been to apply external applications and certain internal remedies. A number of physicians gave their

(*a*) Patten *v.* Wiggin, 51 Me. 594. (*b*) McKee *v.* Allen, 94 Ill. App. 147.

expert testimony, but their opinions were about as many as their number. Some condemned the treatment absolutely; others upheld it; others, again, said that every doctor had a treatment of his own for that disease. In the trial court the plaintiff won, but the judgment in her favor was reversed on appeal, the court holding that, in view of the evidence, the plaintiff had failed to show that her physician had adopted a treatment which was clearly unwarranted.

It is obvious that, in order to make a physician liable on account of a departure from an established practice, the departure must have had some deleterious effect. This must be clearly proven, as no speculation in this regard may be indulged in. Thus, where a surgeon, in connection with reducing a fracture of the patient's arm, had advised bathing the parts with a decoction of wormwood and vinegar, which the expert testimony condemned, the court found, in view of the evidence, that such application could not have injuriously affected the desired cure, and held that such technical violation of the surgeon's duty could not avail the plaintiff where injury could not be directly traced to it. (*a*)

The Physician Must Exercise Best Judgment.

The physician, though possessed of reasonable and proper knowledge and skill, and exercising due care in its application, is occasionally confronted by conditions so complicated that no recognized mode of treatment of any one of the conditions present will meet the exigencies of the case. Then it is that the physician is confronted by the third requirement, viz., that in all cases where there is room for doubt he must use his best judgment.

At such time it will be reassuring to the physician to know that, if he is possessed of proper skill, and, in the careful exercise of his best judgment, errs, such error will not involve him in legal liability. (*b*) This principle naturally applies with increased force to all cases giving rise to difference of opinion. From this it should not be inferred, however, that where the physician has

(*a*) Winner *v.* Lathrop, 67 Hun, (N. Y.) 511.

(*b*) DuBois *v.* Decker, 130 N.Y. 325; Heath *v.* Glisan, 3 Ore. 64; West *v.* Martin, 31 Mo. 375; Wells *v.* World's Dis. Med. Assn., 120 N. Y. 630.

strong doubts as to the nature of a malady, or the course of treatment to be pursued, and does not feel himself to be competent to properly take care of the case, he may speculate upon it and simply trust to his good judgment in making a correct decision. Under such circumstances it is his duty to recommend the patient to employ another physician. (*a*) Nor has the rule exempting a physician from liability for mere error of judgment any application in the case of one who lacks knowledge in the elemental sciences of anatomy, physiology, chemistry, physics, etc., since he can clearly have no judgment at all upon any question affecting the human body. The law contemplates a judgment founded on skill and a fair knowledge of these sciences; and one who, without such equipment, would undertake the practice of medicine could not, of course, be heard to say that he has simply gone wrong in his judgment. (*b*)

Treatment to be Tested by One's School of Medicine.

It has been seen above that the reasonable and ordinary skill, care and diligence required of a physician is to be tested by that which practitioners in the same general neighborhood and in the same general line of practice ordinarily have and exercise in like cases. From this well-recognized premise it has been properly reasoned that if the practitioner belongs to some particular school of medicine, such as the allopathic, (*c*) homeopathic, (*d*) or botanic, (*e*) he has the right to have his treatment tested by the general doctrines of his school, and not by those of others. Were the rule otherwise, it would simply amount to legally recognizing one particular school in preference to another, and that this would be unjust and improper is obvious. And so it has been held, in the cases cited in the notes, that it is not within the province of a judge to decide which school, in his opinion, is the best.

The above rule is not, however, to be extended so far as to comprise within its pale a clairvoyant or other similar healer. This point has been ably discussed in a case decided by the Supreme

(*a*) Pepke *v.* Grace Hospital, (Mich.) 90 N. W. Rep. 278; Burnham *v.* Jackson, 1 Colo. App. 237.
(*b*) *Cf.* McClelland on Civil Malpractice, p. 273.
(*c*) Martin *v.* Courtney, 75 Minn. 225, 77 N. W. R. 813.
(*d*) Force *v.* Gregory, 63 Conn. 167.
(*e*) Bowman *v.* Woods, 1 Greene (Ia.) 441.

Court of Wisconsin in 1888,(*a*) and the particular ground upon which the healer was denied the asserted right to have his treatment tested by the doctrines of his own school of medicine was that he did not belong to any particular school. The evidence showed that his mode of diagnosis and treatment consisted in voluntarily going into a sort of trance condition, and, while in such condition, diagnosticating the case and prescribing for the ailment. That he professed to have no medical knowledge, but trusted implicitly in the accuracy of his diagnosis thus made and of his prescription thus given.

The court was of the opinion that, to constitute a school of medicine, there must be rules and principles of practice for the guidance of all of its members as respect diagnosis and remedies, so that every competent practitioner of a certain school would treat a given case in substantially the same way.

"And so," said the court, "one school may believe in the potency of drugs and blood-letting, and another may believe in the principle of *similia similibus curantur;* still another may believe in the potency of water, or of roots and herbs; yet each school has its own peculiar principles and rules for the government of its practitioners in the treatment of diseases." The court then observed that clairvoyants observed one mode of practice only to the extent of diagnosing and prescribing for their patients, so that the treatment prescribed by different clairvoyants for a similar condition differed as greatly as the modes of treatment of such condition by practitioners of entirely different schools of medicine. Therefore the clairvoyant constituted no particular school of medicine; but that, by holding himself out as a practitioner of medicine, he impliedly contracted that he was competent, and the law would hold him responsible for a failure to exercise reasonable skill and care in the exercise of his vocation.

Test Applied to All Acting as Physicians.

As implied by the foregoing paragraph, the test of professional knowledge, skill, and care is applied to all who hold themselves out as physicians or healers of disease, and accept employment as such, whether they are qualified physicians or mere pretenders without medical skill. (*b*) So, where a druggist treats an injured finger and while doing so holds himself out as a physician, and the patient supposes him to be a physician, he will, in case of injury, be chargeable with the liability of a physician. (*c*) Where, however,

(*a*) Nelson *v.* Harrington, 72 Wis. 591.
(*b*) Nelson *v.* Harrington, 72 Wis. 591.
(*c*) Mathei *v.* Wooley, 69 Ill. App. 655.

one does not profess to act as a physician, but merely renders his advice or services as a friend or neighbor, he incurs no professional responsibility. (*a*) So, where a midwife undertook to treat an inflamed condition of an infant's eyes, and through the inefficiency of the remedies used, and the time lost in treatment by the midwife, the child became blind, the court held that the treatment of the diseased eyes was not within the scope of the midwife's employment, and that she could not be held to possess the qualifications of a physician. (*b*)

What will amount to holding one's self out as a physician is peculiarly a question of fact to be decided by the jury in the particular case; and evidence upon which one jury might base a verdict, would, perhaps, by another jury, be considered inadequate to fix a professional responsibility. In an early case in Wisconsin it was held that where one was called as a surgeon and undertook the management of a broken leg, attended the case seven weeks, was called "doctor" during the attendance, and consulted with other surgeons—these facts should go to the jury, being relevant to the question as to whether he held himself out as a surgeon and thereby assumed the responsibilities of one. (*c*)

Duty of Patient to Submit to Treatment.

It is the duty of the patient to submit to examination and treatment by the physician, and if the patient refuses to so submit and the physician is thereby prevented from discovering the extent and character of the injury, or from applying the proper remedy, by reason of which damages result, the physician cannot be held liable. If the patient becomes delirious and cannot be made to understand the necessity of the treatment proposed, the physician may co-operate with the patient's immediate family and resort to reasonable force. If the patient is in that condition and members of his family, having him in charge, refuse to allow the proposed treatment, then the physician would not be required to use force, and would not be liable for injury resulting from the failure to use the proposed treatment. (*d*)

(*a*) McNevens *v.* Lowe, 40 Ill. 210.
(*b*) Higgins *v.* McCabe, 126 Mass. 13.
(*c*) Reynolds *v.* Graves, 3 Wis. 416.
(*d*) Littlejohn *v.* Arbogast, 95 Ill. App. 605; Haering *v.* Spicer, 92 Ill. App. 449.

A qualification of this rule appears in the case of Chamberlin *v.* Morgan. (*a*) The patient, a girl of sixteen years, had sustained a dislocation of the arm, which Dr. C., the defendant, did not reduce. The defendant endeavored to prove that the father of the patient called a Dr. R., some time after the accident, to examine the arm, and that Dr. R. proposed to put the patient under the influence of anæsthetics and attempt to reduce the dislocation, but the father refused to submit her to the proposed treatment, which evidence was rejected. The Supreme Court held this ruling to be correct. Mr. Justice Sharswood, in the course of his opinion, said:—

"It was very reasonable for the father of Hattie Morgan to say, when Dr. R. proposed to put her under the influence of an anæsthetic and attempt to reduce the limb, that so long as she was improving as fast as she had since he came home, he should not have it disturbed. Had Dr. C. proposed this experiment, there might be some reason to hold that he should have the opportunity of redeeming his mistake, or even if he had called in Dr. R. to act on his behalf. Mr. Morgan merely requested Dr. R. to examine his daughter's arm and give his opinion about it. That did not oblige him to adopt his advice, or to incur the hazard and expense of another operation. He owed no such duty to Dr. C."

Negligence of Patient—Effect on Physician's Liability.

The principle is well established in the law of negligence that if a party, by his own willful or negligent act, causes or contributes to the injury complained of, his right to a recovery is barred. This principle, together with certain well-defined limitations, finds full application to the subject at hand, and it may be stated as a general rule that a patient cannot recover for injuries consequent upon unskillful or negligent treatment by his physician, if his own negligence materially contributed to them. (*b*)

The most frequent cases in which this principle has been applied are, perhaps, those in which the patient neglected to obey the reasonable instructions and directions given him by the physician, or did not, or, under the pressure of pain, could not, conform to the mode of treatment prescribed, and the current of the authorities is to the effect that such failure, be it willful or negligent, is

(*a*) Chamberlin *v.* Morgan, 68 Pa. St. 168.

(*b*) Lower *v.* Franks, 115 Ind. 334, 14 N. E. 885; Gramm *v.* Boener, 56 Ind. 497; Hibbard *v.* Thompson, 109 Mass. 286; Davis *v.* Spicer, 27 Mo. App. 279.

sufficient to defeat a recovery. (*a*) So, also, where a patient, though told by his physician to visit him again as soon as he felt any pain, neglected to do so, though he did feel pain for a week, no recovery was allowed. (*b*) In all such cases it is assumed, however, that the directions, prescriptions, or course of treatment given by the doctor are such as a physician or surgeon of ordinary skill and care would adopt or sanction. (*c*)

An important limitation exists in cases where it is impossible to separate the injury occasioned by the neglect of the patient from that occasioned by the physician—in other words, where they blend—here the patient cannot recover; but, if they can be separated, then for such injury as the patient may show as proceeding solely from the want of ordinary skill or ordinary care on the part of the physician, a recovery may be had. Thus, where a patient, while under treatment, did himself an injury by his own carelessness, he was allowed to recover of the physician where the latter carelessly or unskillfully treated him afterwards and thus did him a distinct injury. (*d*)

Again, an important distinction has been drawn in this respect. The contributory negligence on the part of the patient must have directly and proximately caused the injury complained of in order to bar his recovery, (*e*) and it is not enough that the patient, by his negligent and willful conduct, subsequently to the physician's negligent or unskillful conduct, enhanced or made worse the injury. To quote the language of a famous text writer:—

"It is no answer to an action, that the injured party, subsequent to the injury, was guilty of negligence which aggravated it. The negligence that will constitute a defence must have concurred in producing the injury." (*f*)

In other words, the contributory negligence which precludes a right of recovery is such as enters into the creation of the cause of action, and not merely supervenes upon it, by way of aggravating the damaging results.

It would be manifestly unjust, however, to allow the patient a full compensation for the injury sustained by him in cases where his

(*a*) Geiselman *v.* Scott, 25 Ohio St. 86; Whitsell *v.* Hill, 101 Ia. 629; Tish *v.* Welker, 7 Ohio N. P. 472; Young *v.* Mason, 8 Ind. App. 264; Haire *v.* Reese, 7 Phila. 138.
(*b*) Jones v. Angell, 95 Ind. 376.
(*c*) Haines *v.* Reese, 7 Phila. 138.
(*d*) Hibbard *v.* Thompson, 109 Mass. 286.
(*e*) Davis v. Spicer, 27 Mo. App. 279.
(*f*) Cooley on Torts, p. 683.

own negligence enhanced the same. The courts have, therefore, quite uniformly held that such contributory negligence operates by way of mitigation of the damages. So, in an action against a surgeon for improperly setting and dressing the patient's broken arm, it was held that a showing on the surgeon's part that the ultimate damage and injury to the arm resulted in part from the subsequent mismanagement and negligence of those having charge of the patient, did not touch the cause or right of action, but did the measure and amount of damages. (*a*) So, also, where a physician was guilty of malpractice, and subsequently thereto the patient failed to obey his instructions, this was held to go in mitigation of damages. (*b*) In all cases it becomes a pure question of fact for the jury, to what extent the patient has, by his own act, aggravated the injury caused by the negligence or mistreatment of the physician; and to that very extent it will be the duty of the jury to reduce the damages which it might otherwise have awarded to the plaintiff.

Duty to Guard Against Contagion.

It is likewise the duty of the physician to use reasonable and proper skill and care to protect his patients and others with whom he comes in contact, from contagious and infectious diseases. So, where a physician, in going from patients affected with small-pox to other patients, carried the contagion, it was held that he was liable to the latter in damages. (*c*) And where a physician was employed to treat a wound which became an infectious sore and informed the patient's wife that there was no danger of infection, and on one occasion directed her to assist him in dressing the wound, whereby she became infected with septic poisoning, it was held that such a state of facts was sufficient upon which to base a cause of action. (*d*)

Erroneously Certifying to Lunacy.

The method of determining the mental condition of one suspected of insanity is regulated by statutes differing somewhat in the several States. A method which is more or less common is to

(*a*) Wilmot *v.* Howard, 39 Vt. 447; see also Sanderson *v.* Holland, 39 Mo. App. 233.
(*b*) DuBois *v.* Decker, 130 N. Y. 325.
(*c*) Piper *v.* Menifee, 12 B. Mon. 465.
(*d*) Edwards *v.* Lamb, 69 N. H. 599.

confine the suspected lunatic upon the certificate of two reputable physicians.

In fixing liability upon a physician for erroneously making such a certificate, it seems to be necessary for the patient to show that he was sane at the time the physician made the certificate of insanity; for, in the absence of a statute requiring the compliance with a certain method or mode of procedure of determining the mental condition of the suspected lunatic, it is irrelevant how negligent or irregular the method of the physician may have been in reaching and certifying a correct conclusion. (*a*)

Where, however, the physician reaches and certifies an incorrect conclusion, the question of whether or not he is liable must be determined by the application of the familiar principles: Was he possessed of the ordinary and proper degree of skill and learning? Did he use ordinary and reasonable care in making the examination and exercise his best judgment in determining the party's mental condition? If the physician came within these requirements, then the law will excuse him for having certified erroneously; but if not, he will be held to respond in damages. (*b*) Upon the other hand, the Supreme Court of Massachusetts has taken the view that a physician, when required to give such a certificate, acts in a quasi-official or judicial position, that he at least occupies the position of a person whose testimony is expressly required by statute in aid of judicial proceedings, and that the privilege which attaches to witnesses in other judicial proceedings should attach to examining physicians, and that "so long as they act in good faith and without malice they should be exempt from liability." (*c*) The statute providing for the commitment of insane, under which this case was decided, provided that no person should be committed to a lunatic hospital without an order or certificate of a judge, that "the order or certificate shall state that the judge finds that the person committed is insane, and is a proper person for treatment in an insane asylum, and the judge shall see and examine the person alleged to be insane, or state in his final order the reason why it was not determined necessary or advisable to do so." The law further

(*a*) Pennell *v.* Cummings, 75 Me. 163.
(*b*) The Law in Its Relations to Physicians, 327; Hall *v.* Semple, 3 F. & F. 337; Pennell *v.* Cummings, 75 Me. 163; Williams *v.* LeBar, 141 Pa. St. 149.
(*c*) Niven *v.* Boland, 177 Mass. 11.

provides that "no person shall be so committed unless, in addition to the oral testimony, there has been filed with the judge a certificate signed by two physicians, each of whom is a graduate of some legally organized medical college, and has practiced three years in the State, and neither of whom is connected with any hospital or other establishment for the treatment of the insane. Each must have personally examined the person alleged to be insane within five days of signing the certificate, and each shall certify that in his opinion said person is insane and a proper subject for treatment in an insane hospital, and shall certify the facts on which his opinion is founded." It will be observed that, under this statute, the certificates of the physicians are not tantamount to a commitment, but that the physicians act in the capacity of expert witnesses to aid in the administration of law; therefore, the conclusion of the court above shown logically follows.

Physician's Duty to Advise Against Injudicious Operation.

The necessity for a physician to have and exercise the requisite knowledge, skill, and care, and to use his best judgment, in determining upon the proper mode or character of treatment of a patient, as well as in the subsequent treatment of the patient, is quite apparent. Accordingly it follows, that if a patient calls upon a physician to perform a certain operation which the physician knows, or should know, to be injudicious, it is his duty to advise against such operation, and his failure to do so may render him liable in damages to the patient; but if the patient is of mature years and sound mind, and if, after the physician has advised him that the proposed operation is unnecessary, or dangerous, or ill-advised, he still insists upon its performance, the physician is then justified in undertaking the operation. (*a*)

Consent to Operation, Etc.

The consent of a patient to receive the services of or to submit to an operation by a physician, is a thing which usually is necessarily implied from the circumstances of the case. Thus, if one calls a physician to attend or to operate upon him, it will be presumed that he consented to such treatment or operation.

(*a*) Gramm *v.* Boener, 56 Ind. 497.

There are circumstances, however, where consent is not so easily implied, and where the question of whether or not it has been given has been the subject of bitterly contested litigation. In the case of State use Janey *v.* Housekeeper, (*a*) where an operation was performed upon a wife, the husband testified that he supposed that the operation was to be for the removal of a tumor from his wife's breast, and that he told the physicians that if the formation in the breast was a cancer, he objected to its removal. On the other hand, there was evidence from which a jury might infer that the wife knew that the formation in her breast was a cancer. Mr. Justice Yellott, who delivered the opinion, on commenting upon the facts as shown by the evidence, and the law applicable, said:—

"When the doctors came to the house, she (the patient) had already prepared herself to undergo the operation. If she consented to the operation, the doctors were justified in performing it, if, after consultation, they deemed it necessary for the preservation and prolongation of the patient's life. Surely the law does not authorize the husband to say to his wife, 'You shall die of cancer; you cannot be cured, and a surgical operation, affording only temporary relief, will result in useless expense.' The husband has no power to withhold from his wife the medical assistance which her case might require."

It has also been held where the patient, who was afflicted with a dangerous disease, was taken by her husband and left under the care of a physician who resided at a distance from the patient's home, that the performance of an operation on the patient, after a lapse of several weeks, was within the scope of the physician's authority, if in his judgment it was necessary or expedient, even though the husband's consent had not been obtained to the particular operation. (*b*)

An interesting case arose in England a few years ago in which the patient, an unmarried woman, who was about to submit to the operation of ovariotomy, told the surgeon, who was said to be one of the most eminent in London, that if both ovaries were found to be diseased, he must remove neither. The surgeon replied, "You must leave that to me." This reply the patient denied hearing. Both ovaries were found diseased and were removed.

The patient, who was engaged to be married, upon learning that both ovaries had been removed, broke the engagement and

(*a*) State use Janney *v.* Housekeeper, 70 Md. 162. (*b*) M'Clallen *v.* Adams, 36 Mass. 333.

brought an action for damages. Upon the trial of the case, Mr. Justice Hawkins instructed the jury in effect that the surgeon had the plaintiff's tacit consent to perform the operation, whereupon they rendered a verdict for the defendant. The "Central Law Journal," in commenting on this case, says:—

"The action of the court in this case has met with very general criticism upon the ground that the facts, involving a direct prohibition, would seem to exclude the possibility of implying consent. As a contemporary says, it is one thing for a surgeon to refuse to operate unless unlimited discretion is confided in him, and quite another thing to deliberately disobey instructions. Undoubtedly the defendant's wisest course would have been to refuse to operate unless the scope of his authority was agreed upon in advance." (*a*)

Whether an American court would follow the precedent of the English court under a similar condition of facts is a question that may well be doubted.

An action brought by a servant girl against a physician for making an examination of her without her consent, shows how liable members of the medical profession are to annoyance and liability for acts conscientiously and skillfully performed within the scope of their ordinary professional duties, and how necessary it is for them to be prepared with necessary knowledge to guard against such liability. In this case the mistress, believing the girl to be pregnant, sent her to her room and sent for a physician to examine her. The physician, on arriving, went to the room, and told the girl that he had come to examine her; she objected, saying that she did not want to be examined; he then explained to her that he was a professional man and instructed her how to prepare herself for examination. She followed the instructions and submitted to the examination, crying all the while. The doctor found that the girl was not pregnant, and so reported. The girl brought suit against the doctor for assault, upon the theory that the examination was only submitted to through fear and duress. The jury, upon trial of the case, rendered a verdict for the doctor. An appeal was taken, the Appellate Court was evenly divided in its opinion, and the verdict was permitted to stand. (*b*)

(*a*) Beatty *v.* Cullingsworth, Q. B. Div., 44 Cent. L. J. 153. (*b*) Law in its Relations to Physicians, 336.

Consent Necessary to Perform Autopsy.

Except in those cases where the law makes it the duty of the physician to perform a post-mortem, he is never justified in mutilating the remains of the deceased without consent of the party having authority to give such consent. Thus, where the physician performs a post-mortem upon the body of a wife, without the husband's consent, he is liable to the husband in damages, and the principal element considered by the jury, in assessing the damages, would be the injury to the husband's feelings. (*a*) And so, where a father places a child in the hands of a physician, he is entitled to immediate possession of the child's body upon its death, and in the condition in which the breath left it, and the physician is liable for a violation of this right. (*b*)

The relatives in whom the right of custody of the dead body vests, and from whom consent to perform a post-mortem should be had, are: First, the husband or wife of deceased. Second, if no husband or wife survives, then the children. Third, if there be no husband or wife, and no children, then: first, the father; second, the mother. Fourth, after them, the brothers and sisters of deceased. Fifth, after them, the next of kin, to the remotest degree, according to the law of descent of personal property. (*c*)

The right of the party naturally having custody of the body of deceased must, however, under certain circumstances, give way to the requirements of public necessity, when an autopsy is properly performed without his consent; that is, when one dies under such circumstances that a physician's certificate cannot be given, and where the cause of death cannot be ascertained from a superficial examination. The physician performing the autopsy in a proper and scientific manner, under the direction of the coroner, will be protected from liability, though he may even then be subject to severe criticism by the relatives and, as the reported cases show, to vexatious and expensive litigation.

(*a*) Foley *v.* Phelps, 37 N. Y. Supp. 471; 1 App. Div. 551.

(*b*) Burney *v.* Children's Hospital, 169 Mass. 57.

(*c*) Law in its Relations to Physicians, 315; *q. v.* for interesting discussion as to property in dead bodies and, generally, of the subject in consideration.

Liability for Malpractice Other Than His Own.

The question of whether a physician may be liable for unskillfulness and negligence of another physician, whom he recommends or sends to attend his patient, depends upon the relations between them. If the physician who has been guilty of malpractice is in independent practice and merely attends the patient of the other physician during his absence or disability, then he, and not the physician whose patients he attends, is liable; (*a*) but if the relation of agency may be shown, or if the negligent physician is an assistant or a partner, and is acting within the scope of the partnership, then both are liable. (*b*)

An illustration of the rule that a physician is not liable for the negligence or unskillfulness of another physician in independent practice is well shown in the case of Myers *v.* Holborn. (*c*) Doctor M., a physician, promised to attend the plaintiff's wife during her confinement. A short time before the event took place he left the city for a three days' vacation, having first visited the patient and made an examination, from which he concluded, as he informed her, that his services would not be needed for a few days. The patient was confined, however, earlier than was expected. In response to a telephone message to the physician's house, one Dr. P. came, stated that Dr. M. was out of town and that he represented him, and proceeded to take charge of the case and to deliver the patient of her child without any objection being made. In caring for the child, he severed the umbilical cord so close to the child's body that it was impossible afterwards to tie it, in consequence of which the child shortly died of umbilical hemorrhage. An action was subsequently brought against Dr. M., but the Court of Errors and Appeals of New Jersey held that there was no liability on the part of Dr. M. Mr. Justice Gummere, in the course of the opinion, said:—

"Dr. P. and the defendant were each of them practicing physicians of this State, having no business connection with one another, except that Dr. P. was attending the patients of the latter while he was temporarily absent; even if it be admitted, therefore, that Dr. P. was employed by the defendant to attend

(*a*) Hitchcock *v.* Burgett, 38 Mich. 501.
(*b*) Landon *v.* Humphrey, 9 Conn. 215; Tish *v.* Welker, 7 Ohio N. P. 472; Hancke *v.* Hooper, 7 Car. & P. 81.
(*c*) Myers *v.* Holborn, 58 N. J. Law, 193.

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(*c*) Myers *v.* Holborn, 58 N. J. Law, 193.

upon the wife of the plaintiff, that fact did not render the defendant liable for his neglect or want of skill in the performance of this service, for an examination of the authorities will show that a party employing a person who follows a distinct and independent occupation of his own is not responsible for the neglect or improper acts of the other."

The liability of a member of a firm of physicians rests substantially upon the same basis as that applying to partners in general. The general rule of law is that a partner can be held responsible for the acts of his co-partner, upon the broad principle of agency; that is, if one of a firm of physicians performs an act within the scope of their common business or vocation, each member of such firm will be liable therefor, be such act one of omission or of commission, and whether such co-partners may have participated in or known of the act or not; where, however, a member of such firm goes clearly outside of the legitimate limits or scope of the partnership business in committing a wanton or willful act, one that it would be against all reason to suppose his partners, even by implication of law, would have consented to or would ratify, the offending partner alone is liable. (*a*)

Survival of Action.

Under the old system of the common law, an action for a tort or civil injury, comprising, as has been above seen, actions against physicians for malpractice, fully abated upon the death of either party, the action being deemed to be of a strictly personal character as distinguished from contractual liabilities, which survived in favor of or against the decedent's estate, as the case might have been. It has been the policy of modern legislation, however, to change this rule and place actions of the class to which those against physicians for malpractice belong upon substantially the same footing as actions arising *ex contractu*, with the result that the death of one of the parties will not end the case, but that the executor or administrator may be substituted in his stead.

To Whom Cause of Action Accrues.

The question of to whom a cause of action accrues in case of improper treatment of a wife or child is somewhat confusing to one

(*a*) Hyrne *v.* Erwin, 23 S. C. 226.

unfamiliar with the theories and fictions of the common law. At common law the family, in certain respects, was regarded as a single entity, and the rights and liabilities vested in the husband and father. Accordingly, when a wife suffered from maltreatment at the hands of a physician, the law regarded the husband as injured, the elements of his loss being the deprivation of the society and services of his wife, and the expense incurred in nursing and caring for her as a result of such maltreatment; to recover this injury, the husband sues alone. In addition to this cause of action accruing to the husband, a cause of action arises in favor of the wife for the injury inflicted upon her, and for the physical suffering to which she has been subjected by such maltreatment; upon this cause of action, the husband and wife sue jointly at common law. In case of injury to a child, practically the same causes of action arise, one to the father for loss of services and for the cost of caring for and nursing the child, and one to the child himself for any permanent injury reaching beyond his minority, and for pain and suffering. In case of suit upon the latter cause, there is this difference: The action must be brought in the name of the child by his guardian, or by a third person, who is styled next friend or *prochein ami*. The father, if living, usually does, and by natural right may appear for the infant as next friend. The rule of the common law giving separate causes of action to the husband and father and to the wife and child for the same act of malpractice has been preserved in the jurisprudence of the several States and is now the law. (*a*)

Question of Malpractice Can Be Litigated but Once.

Where a question or issue has been raised between the parties and has been judicially decided by a court of competent jurisdiction, the question so decided cannot be again litigated between such parties, and is conclusive upon them. The doctrine is known in the law as that of *res adjudicata*, and is of wide comprehensiveness, being designed to obviate a multiplicity of litigation and to further justice. In obedience to it, it has been frequently held by the courts that, where a physician has brought suit against a patient for services rendered, and the case was tried and decided in the

(*a*) Nixon *v.* Ludlam, 50 Ill. App. 273; Stone *v.* Evans, 32 Minn. 243; Long *v.* Morrison, 14 Ind. 595; Law in Its Relations to Physicians, 356.

physician's favor, the patient will thereafter be forever barred from maintaining any action on account of malpractice in the treatment which constituted the basis of the physician's claim, the theory being that all questions pertaining to such alleged malpractice have once been before the court and cannot subsequently be reopened between the same parties. So far all the courts agree, for all the cases concede that if the patient has appeared in the action against him and actually defended on the ground of malpractice, and thus expressly brought the question up for decision by the court, he will not be heard to again raise the question in subsequent proceedings against the physician. But suppose the patient failed to appear and allowed a judgment to go against him by default. Will the judgment thus rendered against him likewise be a bar? Upon this question there seems to be a hopeless conflict in the decisions. From a legal standpoint, there appear to be strong arguments in favor of each side, but, after all, the matter rests upon technicalities, and is not of sufficient interest to the medical profession to be gone into fully. Suffice it to say that in New York, (*a*) New Jersey, (*b*) Arkansas, (*c*) and probably some other States, it has been held that a judgment in favor of the physician will bar a subsequent suit by the patient for malpractice, whether the patient's defence has been interposed or not. On the other hand, in a number of States, among them Indiana, (*d*) Ohio, (*e*) Wisconsin, (*f*) and West Virginia, (*g*) the opposite view has been taken, the rule being that the defence of malpractice must have been introduced and adjudicated upon.

Proof of Malpractice.

It would be a highly rigorous and unjust rule to infer that where the patient does not recover, or a complete cure is not effected, or even where serious illness or death follows the treatment, that the physician is necessarily at fault. In no such case is there any presumption of the absence of proper skill, attention, or faithfulness on the part of the physician; and, indeed, the law always

(*a*) Gates *v.* Preston, 41 N. Y. 113; Blair *v.* Bartlett, 75 N. Y. 150; Bellinger *v.* Craigue, 31 Barb. 534.
(*b*) Ely *v.* Wilbur, 49 N. J. L. 685.
(*c*) Dale *v.* Lumber Co., 48 Ark. 188.
(*d*) Goble *v.* Dillon, 86 Ind. 327.
(*e*) Sykes *v.* Bonner, 1 Cin. R. 464.
(*f*) Ressequie *v.* Byers, 52 Wis. 650.
(*g*) Lawson *v.* Conway, 37 W. Va. 159.

presumes that he was competent for the task which he undertook and did his duty to the best of his ability. (*a*) From this it naturally follows that in all actions based upon a physician's negligence or malpractice, the burden of proof rests upon the patient; that is to say, it is incumbent upon him, first, to allege negligence or want of skill, as the case may be, and then to prove such allegations by legal evidence, provided, of course, that issue has been taken upon them by the physician. (*b*) So, also, where a physician sues for the value of services rendered by him, and the defence of lack of skill and care is interposed, it is not incumbent upon the physician to prove, in the first instance, that he exercised proper care and skill; but the defendant, who has interposed the defence in question, has the burden of sustaining the same by proof. (*c*)

If the patient, in prosecuting an action against a physician for lack of skill, negligence, etc., or in resisting a demand for services rendered, on any such ground, has *prima facie* proven his contention, it is then, of course, incumbent upon the physician to introduce evidence in rebuttal of the patient's claim, and it then becomes a question for the jury, or the court, if sitting as a jury, to weigh all the evidence and properly determine the issues presented.

As regards the degree and extent of proof required on the part of the patient, it may be stated as a general rule, that it is required to prove his case by a preponderance, that is to say, by a greater weight, of the evidence. If the physician has introduced equally creditable evidence, which to the minds of the jury counterbalances or outweighs that of the patient, the latter will have failed in the proof of his case. This rule obtains in all kinds of actions. (*d*) But by saying that the patient must prove his contention by a preponderance of evidence, it is not meant that the evidence adduced by him must be so strong as to produce a clear conviction in the minds of the jury, or to satisfy them beyond all reasonable doubt. It is only in criminal cases that such a strong degree of proof on the part of the prosecution is required. In civil cases it is sufficient if the evidence preponderates in favor of the patient, so that the jury will believe therefrom that the allegations made by

(*a*) Haire *v.* Reese, 7 Phila. 138.
(*b*) Chase *v.* Nelson, 39 Ill. App. 53; Georgia No. Ry. Co. *v.* Ingram, 114 Ga. 639; Winner *v.* Lathrop, 67 Hun, 511; Styles *v.* Tyler, 64 Conn. 432; Haire *v.* Reese, *supra*.
(*c*) Robinson *v.* Campbell, 47 Ia. 625.
(*d*) Herrick *v.* Gary, 83 Ill. 85.

the plaintiff are true. (*a*) So, also, an instruction to a jury to find for the physician unless the patient shows by a preponderance of the evidence a state of facts from which no other "rational conclusion" can be drawn than that the physician was unskilled, was condemned as requiring too high a degree of proof on the part of the patient. (*b*)

So much as to the degree of proof required on the part of the patient. Now, what are the necessary elements, the essential features of his case, which he is required to prove before he will be entitled to recover? The rule is that the patient must distinctly and directly prove the charge of unskillfulness, negligence, etc., and that the jury cannot, except in extreme cases, as hereafter shown, draw the conclusion of unskillfulness or negligence from mere proof of the result following the treatment. Let us illustrate the principle: The patient went to a physician, told his symptoms, and was examined and told that he was ruptured. Thereupon the patient obtained a truss from the physician and had him adjust it to his person. Several times the patient went back and complained of severe pains and, after wearing the truss about two weeks, became sick, and an abscess appeared at the point where the bulb of the truss had pressed. The evidence showed that the patient suffered great pain from the abscess and was sick for a long time, and his contention was that the abscess was the result of too great pressure of the truss, produced by improper adjustment thereof to his body. The Appellate Court of Illinois said:—

"While there is evidence tending slightly to support the contention that the abscess may have been produced by the pressure of the truss, there is absolutely no evidence that defendant was negligent or unskillful in his diagnosis, or in fitting the truss. Proof that he was mistaken as to existence of a rupture, or that the abscess was caused by the pressure of the truss, was not enough to entitle the plaintiff to a verdict." (*c*)

In this case it was, indeed, the fair result of the expert evidence introduced that there was in fact no rupture on the person of the plaintiff, and it is interesting to note the holding of the court, that a mere mistake in making a diagnosis, not shown to be the result of negligence or unskillfulness, does not give rise to a cause of

[a] Hoener v. Koch, 84 Ill. 408.
[b] Petty v. Palmer, 109 Mich. 561.
(*c*) Sims v. Parker, 41 Ill. App. 284.

action. So, in another case, the plaintiff, a school teacher, proved that an operation was performed on her left eye by a surgeon for strabismus; that prior to the operation her eye was strong and in good condition, except as to the affliction mentioned. The operation was successful, so far as straightening her eye was concerned, but she stated that afterwards neither of her eyes was as strong as before; that some time after the operation she had what she called a "spell of sore eyes." The lids were afterwards somewhat inflamed, and her eyes watered when she was out in the wind or the cold, and she suffered from general weakness of the eyes. Upon these proofs she was not allowed to recover. The court said:—

"No proof was offered of the instruments used or the manner in which the operation was performed. No medical or scientific evidence was offered showing the cause of the present condition of the plaintiff's eyes, nor that the defendant was negligent or careless in the performance of the operation. . . . To maintain her action, she should have offered the evidence of skilled witnesses to show that the present condition of her eyes was the result of the operation, and that it was unskillfully and negligently performed." (*a*)

While, as a general rule, it is not competent for the physician, in case of an action against him for malpractice, to show his general reputation for skill and ability, yet it is always proper for him to show by other physicians of standing and expert knowledge that the treatment he gave to the plaintiff was such as a physician of ordinary knowledge and skill would and ought to have given. (*b*) It has also been held to be competent for the physician to show that he has received a good medical and surgical education and is a regularly educated and skillful physician and surgeon. (*c*) On the other hand, the general opinion of another physician as to whether defendant is a skillful practitioner has been regarded as irrelevant. (*d*) Indeed, it is the general rule that, whenever the competency or skillfulness of a physician is in issue, such evidence only is competent, or will be given any weight, as directly or circumstantially throws any light upon that question. Matters merely collateral or remotely related thereto are to be excluded. The courts, of

(*a*) Pettigrew *v.* Lewis, 46 Kan. 78; 26 Pac. Rep. 458.
(*b*) Quinn *v.* Higgins, 63 Wis. 664; Barker *v.* Lane, R. I., 49 Atl. Rep. 963; Stevenson *v.* Gelsthorpe, 10 Mont. 563.
(*c*) Leighton *v.* Sargent, 27 N. H. 460.
(*d*) Boydston *v.* Giltner, 3 Or. 118; Williams *v.* Poppleton, 3 Or. 139; Leighton *v.* Sargent, *supra*.

course, are constantly called upon to rule upon the admissibility and value of such remote facts. Thus, in a New York case, the trial court admitted evidence that the defendant, a physician, had forborne to send a bill since the time when the services were rendered; for this reason alone the Court of Appeals reversed a judgment for two thousand dollars in favor of the patient, holding that the question is entirely foreign to the issue, and that by its admission the defendant is called upon to give explanatory or contradictory evidence, by which the jury may be embarrassed in their deliberations; that they might be inclined to construe such forbearance on the part of the physician as an acknowledgment of his want of skill. (*a*) So, also, in an action against a physician on account of injuries caused by unskillful practice, it is proper to exclude, on the ground of remoteness, testimony of a nurse as to how the defendant's treatment of like cases differed from that of other physicians. (*b*) Nor has the fact that a surgeon changes the course of treatment adopted by another any tendency, in a legal sense, to show that the former course of treatment was not proper at the time. (*c*) It is pertinent, however, for the patient to show, in an action for damages, either by his own testimony or by that of others, that the physician was intoxicated, and what his appearance was at the time the services were being performed. (*d*) And evidence, brought out in the cross-examination of a physician, that he incidentally had the management of farms owned by him, was held to have no tendency to show general incompetency, and was totally insufficient as a foundation of such an argument. (*e*)

On the other hand, the Supreme Court of Indiana held that it is competent for the plaintiff to show, as affecting the skill and knowledge of the physician placed in charge of a case, that he was extensively engaged in pursuits other than the practice of medicine and surgery. (*f*)

When Unskillfulness or Negligence Inferred.

As an apparent exception to the rule that incompetence or negligence will not be inferred from results but must be affirm-

(*a*) Baird *v.* Gillett, 47 N. Y. 186.
(*b*) Challis *v.* Lake, 71 N. H. 90.
(*c*) Wood *v.* Baker, 49 Mich. 295.
(*d*) Merrill *v.* Pepperdine, 9 Ind. App. 416; 36 N. E. Rep. 921.
(*e*) Mayo *v.* Wright, 63 Mich. 32.
(*f*) Hess *v.* Lowrey, 122 Ind. 225.

atively proven, there is a certain class of cases where the results themselves, when proven, manifestly show improper treatment; or where the patient's condition is so obvious that, for a physician to fail to recognize it and apply proper remedies, raises a presumption either of want of proper knowledge and skill, or of negligence.

Cases falling within this exception are of a sort in which it seems quite reasonable to dispense with proof of the impropriety of the treatment, as will appear from the following illustrations:—

In the case of Moratzky *v.* Wirth, which arose a few years ago in Minnesota, the evidence showed that the physician who attended the plaintiff at the time of a miscarriage, in removing the placenta, permitted a piece of it, one by two inches long and two-thirds of an inch thick, to remain and putrefy, by reason of which blood-poisoning and a septic condition ensued, resulting in gangrene and a loss of the patient's leg; and that the physician continued to attend her for about a month without discovering the remaining portion of the placenta. This was held by the Supreme Court to be sufficient, in the absence of an explanation, to justify the conclusion that the defendant, in the exercise of that degree of care and skill which the law exacts of a physician, might and ought to have seasonably discovered and removed the remnant of the afterbirth. (*a*) And so the failure of a physician to discover a serious rupture of the perineum, after repeated examinations, has been held to be actionable negligence. (*b*)

And where a physician was called to attend a patient who had been injured and, after an examination, found that the patient's leg had been broken about eight inches from the hip joint, and properly reduced the fracture, but failed to discover a dislocation of the hip, the court held that the evidence was such as to justify the jury in finding the physician guilty of negligence. The proof showed that the head of the femur had been torn from its socket and pushed upwards and backwards, producing a lump on the hip which was easily discernible; that the doctor's attention was several times called to the fact that the patient's hip was painful, but that he had never examined it, but always said the pain was caused by the broken bone. (*c*) And also,

(*a*) Moratzky *v.* Wirth, 67 Minn. 46.
(*b*) Lewis *v.* Dwinnell, 84 Me. 497.
(*c*) Richardson *v.* Carbon Hill Coal Co., 10 Wash. 648.

where the physician, in reducing a Colles' fracture, bandaged the hand and arm so tightly as to cause the patient great pain, and permitted the bandage to remain until ulcers formed and the flesh sloughed off, it was held that the facts were sufficient upon which to base a judgment, even though it were not shown that the fracture itself was not properly reduced. (*a*)

The doctrine that improper treatment may be inferred from results is limited, however, to an extreme class of cases; thus, the court refused to apply it where a physician failed to discover that his patient's arm was dislocated, he having made more than one careful examination of the injured arm, and having called in another physician for consultation. (*b*)

A physician may so far mistake the condition of his patient as to fail to discover the existence of a fracture and treat the injury as a bruise without becoming liable; in case of such an error, however, the evidence must show that the condition of the patient was such that the extent and character of the injury could not have been discovered by the exercise of reasonable and proper skill and care, and that opportunity for further examination of the injury was not given to the physician—as where the patient's arm was so swollen at the time of the first examination that the extent of the injury could not be discovered, and the patient at the time dismissed the physician and told him to make no more calls until sent for. (*c*) Under such circumstances, however, it would be the duty of the physician to advise the patient that his condition was such as to require further attention, and the failure to give such advise might well be considered by the jury as an act either of incompetence or negligence.

Liability Sometimes Question for the Jury, though Improper Treatment Not Shown.

A second class of cases, apparently constituting an exception to the rule that want of knowledge and skill or negligence must be affirmatively proven, exists in those instances where there is room for a reasonable question as to the physician's skill or care deducible from the results of his treatment, as shown by the evidence adduced

(*a*) Mitchell *v.* Hindman, 47 Ill. App. 431.
(*b*) James *v.* Crockett, 34 N. B. 540.
(*c*) Gedney *v.* Kingsley, 16 N. Y. Supp. 792.

at the trial. These cases usually arise where, upon the trial of a case, the judge, thinking the evidence insufficient to show unskillfulness or negligence, withdraws the case from the jury. Upon appeal, the higher court scrutinizes such acts on the part of the trial judges with great care, and if there is any room to doubt the propriety of withdrawing the case from the jury, it is sent back to the trial court for a new trial. Thus, where the evidence showed that the patient suffered a fracture of the leg near the ankle joint; that the physician was called on the day the injury was received and treated the leg; that five days afterwards he reset the bones and encased the limb in a plaster cast and permitted it to remain for about six weeks; that when the plaster was taken off, the foot and ankle were crooked, and remained so, and were stiff—the Court of Appeals was of the opinion that the trial court erred in not permitting the question to go to the jury, to be determined, from this and similar evidence, whether the physician had been guilty of negligence in setting the broken bones, and therefore reversed the judgment entered for the defendant, pursuant to the direction of the trial judge, and ordered a new trial. (*a*)

Also, where a physician erroneously diagnosticated a patient's ailment as ovarian tumor after an examination of about ten minutes, in which he merely manipulated the abdomen and inserted his finger in the vagina, but did not use a speculum or the uterine sound, by reason of which diagnosis he performed a needless operation, it was held that the facts presented were sufficient to take the question to the jury. (*b*)

Miscellaneous Illustrations.

From the foregoing it will be understood that the physician is never, in the absence of an express agreement to that effect, to be considered as insuring beneficial results from his treatment, and, accordingly, is not liable to the patient for want of success unless it is due to his fault. (*c*) To show such fault, however, it is not necessary that the patient should show him to have been actuated by malice, as malice and willful neglect form no essential feature of malpractice; (*d*) but when they do enter into a case, they are of

(*a*) Hickerson *v.* Neely, 54 S. W. Rep. 842.
(*b*) Griswold *v.* Hutchinson, 47 Neb. 727.
(*c*) Winner *v.* Lathrop, 67 Hun, 511; Leighton *v.* Sergeant, 27 N. H. 460.
(*d*) Shuman *v.* Drayton, 14 Ohio, C. C. R. 329.

material import in determining the amount of damages to which the plaintiff is entitled, as will be hereafter shown.

Where a physician, who is employed merely to reduce a fracture, through a failure to exercise proper care or skill, bandages the limb too tightly, he is liable for such act, and the failure of the attending physician to discover the tightness of the bandages and loosen them, though it is his duty to do so, will not relieve the physician who reduced the fracture from liability. Such negligence of the attending physician is, however, a fact to be taken into consideration by the jury in fixing the amount of damages. (*a*)

It has been shown that a physician, in the treatment of his patients, is required to exercise his best judgment, and that he will not be held to answer for an error in judgment; accordingly, it is held that a physician who, in repairing a laceration of the perineum, broke a needle, and, by reason of the patient's condition, was unable to make the necessary search to locate the fragment, but closed the wound with a part of the broken needle in the perineum and did not inform the patient of the accident, was not liable for his failure to impart such information. To have told her at that stage would only have endangered the success of the operation; but upon the discharge of the patient it would have become his duty to have apprised her of the accident. In this case the physician was seriously injured by being thrown from a carriage just prior to the time the patient was dismissed, so that she did not learn of the broken needle until it was discovered and removed by another physician in a subsequent operation. Upon the failure of the physician to apprise the patient of her condition at the time such information was due her, the court said:—

"Dr. P. did not have to anticipate dangerous and unavoidable accidents, but he had a right to expect that he would be able to attend Mrs. E. until she got well." (*b*)

And, accordingly, a physician's failure to inform a patient that she is suffering from a felon is not necessarily improper. (*c*)

While it is a rule of law that if the physician frankly informs the patient of his want of skill, or the patient is in some other way

(*a*) Hathorn *v.* Richmond, 48 Ver. 557.
(*b*) Eislein *v.* Palmer, 7 Ohio Dec. 365.
(*c*) Twombly *v.* Leach, 65 Mass. 397.

fully aware of it, the patient cannot complain of the lack of that which he knew did not exist, (*a*) yet this rule will not always relieve the physician from liability where he attends the patient after such a declaration and where deleterious results ensue. This is well illustrated in the case of Lorenz *v.* Jackson. (*b*) In this case the plaintiff, who was struck by a flying fragment of steel, which imbedded itself in his left leg above the knee, called in Dr. J. who announced that the wound was of a serious nature and character, and that he did not regard himself as sufficiently experienced in surgery to properly treat the case, and advised that the services of a more skilled surgeon be secured. Pursuant to this advice Dr. B. was employed, the patient was removed to a table, and ether was administered by Dr. J., while Dr. B. probed for the piece of steel, widening the wound in the limb, and thereafter applied bandages. Dr. J. remained with the patient through the night and administered to him hypodermic injections of morphine and atropia. The treatment continued for several days, until about the eighth day after the injuries were received, when it was found that dry gangrene had ensued. Another physician was then called, and it was finally determined that the limb must be amputated. An action was commenced against Dr. J. and Dr. B. and a verdict of three thousand dollars rendered. Dr. J. appealed from the judgment entered upon this verdict. In rendering the decision of the court upon appeal, Mr. Justice Hardin, after recurring to the rule above stated, said:—

"During the charge the trial judge recognized the rule stated in the citations just made, and carefully instructed the jury in respect thereto, and afforded the jury an opportunity to relieve the appellant from liability by the application of the rule if, in the judgment of the jury, the facts and circumstances disclosed by the evidence warranted its application. It must be assumed that the verdict of the jury, in regard to the branch of the case referred to, in the rule of law just mentioned, was found adversely to the appellant."

The justice then announced that, after weighing the evidence, which they found very conflicting, the court was constrained to follow the rule that, unless the verdict is "against the clear weight of the evidence," it will not be disturbed. Accordingly, the judgment against Dr. J. was affirmed.

(*a*) Shearman & Redfield on Negligence, § 607, Fourth Ed. (*b*) Lorenz *v.* Jackson, 88 Hun, 200.

As a matter of law, the patient is entitled to rely upon representations made as to his condition by the physician, and he is under no legal obligation to call in other physicians to determine whether he is being properly treated, unless he is fully aware that he is receiving improper treatment. (*a*)

A peculiar case of liability arose where a physician took a non-professional man with him to a case of confinement. The evidence showed that the patient lived at a distance, that the night was dark and stormy, and that the road over which it was necessary to travel was so bad that a horse could not be ridden or driven; that the doctor was sick and very much fatigued from overwork, and therefore asked a friend to accompany him and assist in carrying a lantern, umbrella, and other necessary articles; that upon arriving at the house the physician stated to the husband "that I had fetched a friend along to help carry my things;" that neither the patient nor her husband knew the "friend," but supposed he was a student or physician; that the house consisted of one room, and that the attendant, while in the room, conducted himself in a proper and becoming manner. A judgment was rendered against the physician and his friend, from which they appealed, and which judgment was affirmed by the Supreme Court. Mr. Chief Justice Marston, who rendered the opinion of the court, in the course of his remarks, said:—

"Dr. D. therefore took an unprofessional, young, unmarried man with him, introduced and permitted him to remain in the house of the plaintiff, when it was apparent that he could hear, at least, if not see, all that was said and done, and, as the jury must have found, under the instructions given, without either the plaintiff or her husband having any knowledge or reason to believe the true character of such third party. It would be shocking to our sense of right, justice, and propriety to doubt even but that for such an act the law would afford an ample remedy. To the plaintiff the occasion was a most sacred one, and no one had a right to intrude unless invited, or because of some real and pressing necessity, which it is not pretended existed in this case. The plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it and to abstain from its violation. The fact that at the time she consented to the presence of S. (the 'friend'), supposing him to be a physician, does not preclude her from maintaining an action and recovering substantial damages upon afterwards ascertaining his true character. In obtaining admission at such a time and under such circumstances without fully disclosing his true character, both parties were guilty of

(*a*) Schoonover *v.* Holden, 87 N. W. Rep. 737.

deceit, and the wrong thus done entitles the injured party to recover the damages afterwards sustained from shame and mortification upon discovering the true character of the defendants." (*a*)

Measure of Damages.

Upon establishing his case against the physician for malpractice, the patient is, of course, entitled to have the injury sustained by him properly weighed by the court, or, rather, the jury, and the proper damages awarded to him. The extent to which he becomes entitled to such damages, in any particular case, is usually termed the measure of damages.

Damages in general, and also those applicable to cases against physicians, are of three sorts, *nominal*, *compensatory*, and *punitive* or *exemplary*. Nominal damages are given in cases where there is a mere technical violation or infraction of a right, but no actual damage has been suffered; the amount awarded in such cases has frequently been ridiculously small, often only one cent, but the verdict has the effect of throwing the costs of the suit upon the defeated party, except in those jurisdictions where a verdict for a substantial amount is by statute made requisite to carry costs, and so establishing a technical victory against him. Compensatory and punitive damages are allowed where there is both a wrong and an injury. The former are designed to represent an exact equivalent in money of the injury actually sustained, and thus to give full compensation therefor; the latter are imposed in cases of gross and willful malice, fraud, or violation of duty, and are intended to make an extra provision, by way of punishment to the offender, beyond allowing full compensatory damages against him. The following illustrate the application of the respective classes of damages.

Nominal Damages.

This class of cases arises most frequently where the patient goes into court expecting to recover substantial damages, but where, after hearing the evidence, the court decides that he is only entitled to a nominal allowance. The rule may be summarized thus: Where, though malpractice is proven, there is no injury shown by the evidence, or, if an injury is shown, it is impossible to say

(*a*) DeMay *v.* Roberts, 46 Mich. 160.

that it was the result, direct or indirect, of such malpractice, the damages can be only nominal. In a case arising in New York (*a*) the plaintiff had a miscarriage, and soon thereafter her general health began to fail. She sued the physician, on the theory that his treatment, in connection with the miscarriage, had brought about the decline in her health; but the evidence utterly failed to show that her condition was due to any malpractice, though there was evidence of improper treatment. The court instructed the jury as follows:—

"The defendant, not being responsible for the miscarriage, he is not to be made liable for any of its consequences. If liable at all, he is liable only for the effects of his maltreatment of the plaintiff. So that, should you find it impossible to distinguish between the consequences of the miscarriage and the consequences of the maltreatment, you will award only nominal damages against the defendant."

Compensatory Damages.

Compensatory or, as they are sometimes called, substantial damages are proper whenever the patient establishes an ordinary case of malpractice against the physician without any such aggravating circumstances as to authorize the recovery of exemplary damages, and where he shows substantial injury resulting therefrom. The measure of damages is the loss or injury directly and naturally resulting from the physician's fault or negligence, (*b*) and the extent of the liability and of the damages recoverable depends in every case upon the particular circumstances. (*c*) The jury (unless the case is submitted to the judge) are the sole arbiters of the amount which the patient should recover, the theory being that it should represent as nearly as possible in dollars and cents the loss or injury sustained. And, indeed, it has been said that either the patient is entitled to full compensation, or the physician is entitled to be wholly exonerated. (*d*) Among the elements to be taken into consideration, in assessing the damages, are the pain and suffering caused by such malpractice; but here the jury is usually warned to allow damages for only such pain and suffering as is added by the malpractice and directly attributable to it, and not

(*a*) Becker *v.* Janinsky, 27 Abb. N. C. 45.
(*b*) Challis *v.* Lake, 71 N. H. 90.
(*c*) Teft *v.* Wilcox, 6 Kan. 46; Heath *v.* Glisan, 3 Or. 64; Boydston *v.* Giltner, *id.* 118; Williams *v.* Poppleton, *id.* 139; Chamberlain *v.* Porter, 9 Minn. 260.
(*d*) Heath *v.* Gilson, 3 Or. 64.

such as is caused by the original malady or injury; (*a*) the expense directly caused by the malpractice, particularly that incurred in the endeavor to be cured of the evil effects of the malpractice, allowance being made, however, for expense that is necessary and reasonable in amount only; (*b*) the loss of time sustained by the patient, the reduction of his money-earning capacity, his disfigurement or impairment of senses or faculties, and, generally, all the detriments caused by the physician's improper course. To illustrate: The measure of damages in an action against a surgeon for malpractice in setting and treating a broken arm, is only the damage accruing to the patient in excess of that which would have accrued naturally from the breaking of his arm if he had been treated with the degree of skill ordinarily possessed by surgeons. (*c*) Merely speculative or problematic damages are never recoverable.

As has been said above, the amount to be awarded the patient is a matter left entirely to the jury, and thus it is natural that such amounts vary greatly in different cases, it being impossible to lay down any exact monetary standard for the adjustment of such damages as are here under consideration. The jury must, however, always be guided by the instructions of the judge, who will, in a general way, charge them as to the elements to be taken into consideration and the rules of law to be followed by them in assessing the damages; and whenever the jury returns a verdict which is either grossly inadequate or so excessive as to clearly indicate that it is the result of prejudice or passion, it is not only within the power but it is the duty of the judge to set it aside and to award a new trial.

A few illustrations from adjudicated cases may serve to give some idea as to the views which have been taken by courts and juries on the question of amount allowable. In the case of Tefft *v.* Wilcox, (*d*) the plaintiff, having suffered from rheumatism and neuralgia in his shoulder, sustained a dislocation of the shoulder, which was treated so badly that it became permanently disabled. He was allowed $2,900. In the case of Kelsey *v.* Hay, (*e*) both

(*a*) Wenger *v.* Calder, 78 Ill. 275; Carpenter *v.* McDavitt, 53 Mo. App. 393; Gates *v.* Fleicher, 67 Wis. 504.
(*b*) Hewitt *v.* Eichenbart, 36 Neb. 794.
(*c*) Miller *v.* Frey, 49 Neb. 472.
(*d*) Tefft *v.* Wilcox, 6 Kan. 46.
(*e*) Kelsey *v.* Hay, 84 Ind. 189.

legs of the plaintiff became permanently crippled by reason of improper treatment of fractures; he was allowed $4,500. In the case of Lathrop *v.* Flood, (*a*) a physician was employed to attend a woman during her first confinement; after visiting her several times, he decided to use instruments to aid in the delivery, whereupon the patient screamed so much in her agony that the physician threatened to abandon the case if she did not quit screaming. After a second or third unsuccessful attempt to use the instruments, the physician abruptly left the house. It took an hour before another physician could be obtained, who decided that the patient's condition at that time did not require the use of instruments. For the unwarranted abandonment of the case and the mental suffering thereby caused to the patient, she was awarded $2,000. In the case of Quinn *v.* Higgins, (*b*) $1,600 was allowed for the maltreatment of a broken leg which resulted in a "false joint." For the particulars of these cases, the reader may find it interesting to refer to the original reports of them.

Punitive Damages.

Punitive or exemplary damages may be recovered when there are particularly aggravating circumstances connected with the case against the physician, such as fraud, malice, cruelty, negligence so gross as to raise the presumption of indifference, or similarly unwarrantable conduct. An instance or two from the adjudicated cases will serve to illustrate the application of the principle underlying this class of damages. In the case of Gray *v.* Little, (*c*) a physician attended the plaintiff's wife at the time of her confinement. Apart from carelessness, negligent and unskillful conduct, the evidence showed inhuman and cruel treatment on the physician's part, whereby the child died after delivery and the mother's death was accelerated. The Supreme Court of North Carolina decided that the severest penalty known to the law, by way of damages, should be meted out to the physician. Brooke *v.* Clark (*d*) was a case in which exemplary damages were allowed, it seemed, upon the theory of gross negligence solely. The evidence developed the fact that the physician attending at the child's birth tied a ligature

(*a*) Lathrop *v.* Flood, 63 Pac. Rep. 1007.
(*b*) Quinn *v.* Higgins, 63 Wis. 664.
(*c*) Gray *v.* Little, 126 N. C. 385.
(*d*) Brooke *v.* Clark, 57 Tex. 105.

around its penis instead of the umbilical cord, whereby the glans was destroyed. The language of the court, in commenting upon the question of damages, is a fair statement of the law applicable:—

"The criminal indifference of the defendant to results was a fact which the jury were at liberty to infer from the gross mistake which he either made or permitted to be made, and the grievous injury which was liable to result therefrom. If there was other evidence tending to negative any wrong intent or actual indifference on his part, still the existence or non-existence of such criminal indifference was a question of fact for the jury and was rightly submitted to them. If the conduct of the defendant in the discharge of his duty as accoucheur was so grossly negligent as to raise the presumption of his criminal indifference to results, we very greatly doubt whether it should avail to exempt him from exemplary damages for him to show that he had no bad motive, and that he acted otherwise in a manner tending to show that he was not, at heart, indifferent. Where the act is so grossly negligent as to raise the presumption of indifference, evidence that in other matters connected therewith he had shown due care, and that actual indifference would have been in fact indifference to his own interest, should, we think, not be allowed for any other purpose than to be considered by the jury in fixing the amount of exemplary damages."

Accordingly, a verdict and judgment in the child's favor for $5,500 was sustained.

Only One Recovery Permitted for Same Act of Malpractice.

A patient having once recovered and collected a judgment from a physician for a given act of malpractice, such judgment is a complete satisfaction of all damages which may have resulted, or which may thereafter result, from such act of malpractice, and no further action can be brought to recover for further injurious results as they may subsequently manifest themselves.